United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1383

ORIGINAL

B
P/S

In The

United States Court of Appeals

For The Second Circuit

SALVATORE ALBANESE,

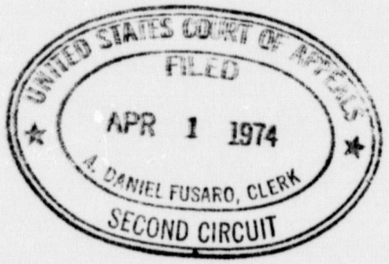
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER-APPELLANT



H. ELLIOT WALES
Attorney for Petitioner-Appellant
747 Third Avenue
New York, New York 10017
(212) 421-1993

JEROME LEWIS
On the Brief

(7051) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Brief

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

SALVATORE ALBANESE, :

Appellant-Petitioner,

: Docket #

- against -

:

UNITED STATES OF AMERICA,

:

Respondent.

----------X

BRIEF OF APPELLANT ALBANESE

This is an appeal from an order and opinion of the district court (D.J. John F. Dooling, Jr.) denying appellant Albanese's application for credit for pretrial period of confinement toward the sentence of five years probation which the district court imposed (73 Civil 1789 - EDNY).

On June 6, 1969, Judge Dooling imposed a sentence of five years of probation upon Albanese. Simultaneously a ten year sentence of imprisonment was imposed, but its execution suspended. Defendant commenced service of his sentence of probation on January 18, 1972, after he had exhausted his appellate rights.

By notice of motion, dated November 30, 1973, Albanese

petitioned the sentencing judge to give him credit for 1170 days (three years, two months, thirteen days) of pretrial confinement (March 7, 1960 - May 20, 1963). 3a-10a. The matter was fully argued on December 4, 1973. 11a-39a. At the end of the oral argument, Judge Dooling announced that the application was denied, (39a) and he so endorsed the motion papers.1a. A timely notice of appeal has been filed. 2a.

OPINION BELOW

The district court did not write an opinion. The transcript of the oral argument is set forth in full in the appendix for it contains a complete statement by the district judge as to why the application is denied. 11a-39a.

STATUTES INVOLVED

18 USC 3651 authorizes a district court to suspend the imposition or execution of a prison sentence, and to impose a probation sentence not to exceed five years.

18 USC 3653 empowers a district judge to terminate or modify a sentence of probation so as to discharge a probationer.

28 USC 2255 - the so-called federal habeas corpus statute - permits a defendant to collaterally attack his judgment of conviction and

sentence.

18 USC 3568 deals with credit toward service of a sentence of pretrial confinement, and is the critical statute in this appeal. In its relevant parts it reads:

> "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed."

STATEMENT

On June 6, 1969, after trial, Judge Dooling imposed a five year sentence of probation upon Albanese. At the same time the district court imposed, but suspended execution, a ten year period of imprisonment. Albanese began to serve his sentence of probation on January 18, 1972, after he had exhausted his appellate rights. sub. nom. United States v. Persico, 425 F2d 1375 (CA-2, 1970), cert. denied, 400 U. S. 869.

Albanese had been confined continuously in this case from March 7th, 1960 to May 20, 1963 - a period of three years, two months, thirteen days - or 1170 days. Perhaps this Court will recall this case was tried five times. Albanese was arrested on March 7, 1960, and held continuously until after this Court reversed the conviction stemming from the first trial

(305 F2d 534). On May 20, 1963 he was released from federal confinement.

Judge Dooling has not contested the defense assertions, and its supporting documents, that Albanese did serve 1170 days in pretrial confinement. In fact the presentence report confirmed this development.

In imposing sentence, Judge Dooling did not state for the record he was taking into consideration the lengthy period of pretrial confinement, and imposing probation for that very reason. He merely imposed sentence without any comment (see pages 2-3 of H. Elliot Wales affidavit - 5a-6a):

> "THE COURT: It is my intention to impose and suspend the execution of the sentence of imprisonment and accord you the maximum probation term. I understand your State probation is now over.
>
> MR. ALBANESE: Yes, your Honor.
>
> THE COURT: On the jury's verdict of guilty to Counts 1 and 2 of the indictment, you, Salvatore Albanese, are committed to the Attorney General or his duly authorized representative who shall designate the place of confinement for ten years. Execution of the sentence is suspended and you are placed on probation for five years under the conditions provided by the standing Order of the Court."

In oral argument, on this application, the district judge agreed with petitioner's counsel that he (the Court) could have stated for the

record that he was giving credit for prior time, but that he did not make any such statement (33a):

"MR. WALES: You could have said, I'm giving him credit because I'm taking into consideration certain things...

THE COURT: That is right...

MR. WALES: But Your Honor did not do it in this case.

THE COURT: No."

Earlier in the oral argument, on the motion, Judge Dooling stated he gave Albanese a suspended sentence and probation because he had in fact been incarcerated in both federal and state prisons for a number of years -

"So that was the thinking, in other words, the time spent in prison was very much taken into account in the shaping of the sentence." 25a.

On the other hand there was no denying that the sentencing record was silent as to the thoughts which may have motivated the sentencing judge. As such the Court could not quarrel with counsel's argument (28a):

"What does the record reveal, and I don't think the record reveals, your Honor, that your Honor took any of these things into consideration; perhaps they went on in the back of your mind when you imposed sentence upon Albanese that day, but I think the record

> is silent on that score, and I think that this application today has to be determined solely upon the record as if your Honor had no independent recollection of it: You have to read the record. If the record shows that you took that matter into consideration and you gave him credit for it or were you asked for credit by the section, then that would be one thing--"

It was not denied that Albanese had been on probation from January 18, 1972 to December 4, 1973 (the date the application was argued) - a period of 22½ months. If the period in contest - three years, two months, thirteen days - were added to the 22½ months already served, Albanese would have completed his probation period. As such this case is ripe for adjudication pursuant to 28 USC 2255.

While the district court did not deny that 18 USC 3568 authorizes credit against a prison sentence for pretrial confinement, Judge Dooling did not believe that the statute was applicable for credit against a sentence of probation. The sentencing judge stated Albanese was not entitled to a credit "unless the law mandates it" (26a), and he concluded that the law did not mandate it. He believed that inasmuch as there was no case law on point, and since the statute did not specifically spell out credit for probation, he was not prepared to read it into the statute.

POINT

ON THE BASIS OF THE TRANSCRIPT OF THE SENTENCING PROCEEDINGS, ALBANESE WAS ENTITLED TO CREDIT AGAINST HIS SENTENCE FOR TIME SERVED IN PRE-TRIAL CONFINEMENT

Only the transcript of the sentencing proceedings, and not the sentencing judge's recollection of what motivated him, can be the basis for deciding an application of this nature.

We cannot quarrel with the thought process and sensitivity of Judge Dooling as he fashions a sentence for a particular defendant, such as Albanese. Nor can we contest his memories and his recollections of what he did on June 6, 1969, and why he did it. It is our position that a record of the sentencing proceedings was made by counsel, client and the Court, and that transcript embodies the whole matter. At that time all have the opportunity to speak fully and candidly. We would expect that the district court would articulate its basic reasons in imposing the particular sentence that it did. Then we could be assured that the sentence was based on the proper exercise of discretion, and not on some arbitrary basis. It is important that a record be made with regard to any judicial exercise of discretion. Only then can an appellate review ascertain whether the district court utilized appropriate factors in reaching the decision it did.

In this instance the absence of a record of judicial exercise of discretion deprives us from knowing what motivated the sentencing judge on that particular day. His recollection years later should not be called into play, or even be put into a position where they can be questioned. Suppose the sentencing judge just had no recollection years later? Suppose the sentencing judge had since passed away? In this regard the district court was hard pressed to answer petitioner's argument (28a):

> "What does the record reveal, and I don't think the record reveals, your Honor, that your Honor took any of these things into consideration; perhaps they went on in the back of your mind when you imposed sentence upon Albanese that day, but I think the record is silent on that score, and I think that this application today has to be determined solely upon the record as if your Honor had no indepenent recollection of it: You have to read the record. If the record shows that you took that matter into consideration and you gave him credit for it or were you asked for credit by the section, then that would be one thing--"

Collateral attacks (18USC 2255) are best decided on the transcripts of the actual proceedings. This case is no exception. We had a full sentencing proceeding. We must assume the district court enunciated what he wanted to say, and remained silent as to those areas he chose not to articulate. All of us - bench and bar - are bound by what we say and what we do not say. Review of proceedings months and years later can only be done on that basis.

As such this Court should consider only what Judge Dooling stated at the time of the sentencing, and not what the district judge enunciated some four and a half years later on this application. The district court agreed he did not state he was giving Albanese credit for prior time served. Also Judge Dooling agreed there was no reason why he could not have so stated it at the time of sentencing (33a):

"MR. WALES: You could have said, I'm giving him credit because I'm taking into consideration certain things...

THE COURT: That is right...

MR. WALES: But Your Honor did not do it in this case.

THE COURT: No."

Apparently there are no reported decisions on this particular issue. Nor does the statute (18 USC 3568) specifically refer to "probation" so as to answer this issue one way or another. On the other hand we cannot pass off a sentence of probation as if it were not a sentence at all. In every sense probation embodies the notion of "custody". It is merely that the walls are expanded, and the defendant serves his sentence in a larter area of confinement. However the sentence is served in every sense of the word. The terms and conditions of probation are numerous and detailed. An infraction of any such terms exposes a defendant to a

violation of probation proceeding - with all its dire consequences.

As a sentence of probation is a sentence for a period of supervision, and does involve the concept of custody, there just is no reason why he should not get credit for pre-trial confinement. Inasmuch as the district court imposed the maximum permissible period of probation - five years, it is obvious the court did not give Albanese credit toward the probation sentence. Nor can it be argued that Judge Dooling gave Albanese that credit when he suspended the execution of the ten year sentence. Obviously ten year credit is not given for three years of prior confinement.

The district court did not wish to see Albanese returned to prison. The events had happened years before. Albanese had served substantial time in both federal and state institutions. His culpability was not as great as several of the others. By 1969 Albanese was a different man from what he was in 1961, when he was first sentenced. However there is nothing to indicate Judge Dooling believed a three or four year sentence was in order, and that he was not imposing it solely because of the three year pre-trial confinement.

18 USC 3568 is an enlightened statute which recognizes that those who are confined prior to the final sentence should not in toto serve more time than those who commence service of asentence only after it is im-

posed. As such it really makes little difference whether the final sentence is imprisonment or probation. What is important is that whatever the final sentence be, credit should be allowed.

CONCLUSION

The order of the district court should be reversed, and appropriate credit should be directed.

Respectfully submitted,

H. ELLIOT WALES
Counsel for Appellant Albanese
747 Third Avenue
New York, New York 10017
212- 421-1993

On the Brief -

JEROME LEWIS, ESQ.

A 201 Affidavit of Service by Mail G LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

ALBANESE,

Petitioner-Appellant,

against

Affidavit of Service by Mail

U.S.A.,

Appellee,

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, LAUREL N. HUGGINS, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1050 CARROLL PL, BNX, N.Y.

That upon the 28th day of March, 1974, deponent served the annexed Appellant's Brief upon U.S. Attorney-~~Southern~~ Eastern District attorney(s) for Appellee in this action, at 225 Cadman Plaza, Brooklyn, N.Y.

the address designated by said attorney(s) for that purpose by depositing 2 true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 28th day of March 19 74 March

Laurel N. Huggins

Print name beneath signature

LAUREL N. HUGGINS

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975